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Nos. 23, 24, 26, 27 and 34

IN THE

Supreme Court of the United States

October Term, 1947

FEDERAL TRADE COMMISSION,

Petitioner,

against

THE CEMENT INSTITUTE, *et al.*;
ATLANTA PORTLAND CEMENT COMPANY, *et al.*;
CALAVERAS CEMENT COMPANY, *et al.*;
HURON PORTLAND CEMENT COMPANY;
BLAINE SMITH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The respondents in the above entitled causes respectfully petition for a rehearing on the following grounds:

I. The statements of law as to "the price discrimination charge in Count II"[1] have no necessary relation to the decision in these cases.

This Court holds that the order of the Commission is by its terms "directed solely at concerted, not individual activity on the part of the respondents".[2] Both the Government and these respondents took this position before this

[1] Pamphlet opinion, pp. 36-40.

[2] Pamphlet opinion, p. 42.

Court. The Circuit Court of Appeals, however, took a different view of the meaning of the order and stated that it was directed not only at concerted action but also that paragraph 3 "... appears to be directed against Respondents in their individual capacity ..." and, further, that "this paragraph would prohibit each individual respondent from absorbing freight even though done in good faith to meet an equally low price of a competitor."[3] In taking this view of the terms of the order, the Circuit Court then had before it a question of law under the Clayton Act, as amended by the Robinson-Patman Act, and proceeded to decide it.[4]

In view of the construction put upon the order of the Commission by this Court, we recognize that the statements of law as to "The Price Discrimination Charge in Count II"[5] have no necessary relation to the decision in these cases. However, the general and, we submit, unnecessary language of the opinion of this Court suggests a doubt as to the right of a mill, acting individually, to reduce its prices in good faith to meet competitive prices that it may find at normal markets which it must serve in order to continue in business. This matter is of special importance to the large number of single mill companies in this industry, particularly those which are economically located at sources of raw material distant from cement consuming markets.

Ambiguity and doubt on this important subject grow out of the language of this Court on page 39 of the pamphlet opinion. We have already noted that this Court construes

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[3] 157 F. (2d) 533 at 543.

[4] See 157 F. (2d) 533 at 560-561, 571-573.

[5] Pamphlet opinion, pp. 36-40.

the order of the Commission to be directed solely at concerted action.

On the other hand, in discussing the question of freight absorption, this Court stated at pages 39-40 after recognizing that Section 2(b) of the Robinson-Patman Act permits a single company to sell one customer at a lower price than it sells to another if the price is "made in good faith to meet an equally low price of a competitor":

> "But this does not mean that §2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. * * * Each of the respondents, whether all its mills were basing points or not, sold some cement at prices determined by the basing point formula and governed by other base mills. Thus, all respondents to this extent adopted a discriminatory pricing system condemned by §2. As this in itself was evidence of the employment of the multiple basing point system by the respondents as a practice rather than to meet 'individual competitive situations,' we think the Federal Trade Commission correctly concluded that the use of this cement basing point system violated the Act. Nor can we discern under these circumstances any distinction between the 'good faith' proviso as applied to a situation involving only phantom freight and one involving only freight absorption. Neither comes within its terms".

The Court then concluded:

> "We hold that the Commission properly concluded that respondents' pricing system results in price

discriminations. Its finding that the discriminations substantially lessened competition and that they were not made in good faith to meet a competitor's prices are supported by evidence. Accordingly, the Commission was justified in issuing a cease and desist order against continuation of the unlawful discriminatory pricing system."

The foregoing language in the opinion of this Court casts doubt upon the right of an individual company to meet the prices of a competitor by freight absorption over any extended period of time without violating the Robinson-Patman Act. On the other hand, there is a suggestion that in sporadic instances an individual respondent may meet an occasional lower price. It is not entirely clear whether this may be done outside of the territory in which a particular respondent would normally have a freight advantage or whether it is intended to relate only to instances of selling in the territory where the individual respondent ordinarily has a freight advantage.

In view of the theorem that repeated and regular meeting of competition ultimately results in a so-called system which is stamped as discriminatory, no businessman could be guided at the present time by the decision or by the order as to the extent to which he may meet competition or when he may cross the boundary and be found to be adopting a system which is discriminatory; nor is it possible for counsel to devise any clear-cut rule to govern the activities of a client as to how often he may meet competition and how far he may extend his competitive selling. There is an ambiguity in this respect which needs to be resolved if the decision of this Court is not to result in re-

straint of normal competitive activity and serious injury to many companies, particularly the single mill companies, in this industry.

Unresolved and unnecessary legal questions on this important and basic point should not be left in the foreground following the decision of these important *Cement* cases.

It is noteworthy that in *Triangle Conduit & Cable Co., et al.* v. *Federal Trade Commission*, Nos. 8639, 8640, 8642, 8644, 8649, decided May 12, 1948, the Circuit Court of Appeals for the Seventh Circuit, on the authority of the decision of this Court in these *Cement* cases, sustained the conclusion of the Commission that individual use of a basing point method of marketing was an unfair method of competition violative of Section 5 of the Federal Trade Commission Act, 15 U. S. C. A. §45 and ordered enforcement of a Commission order directed against individual use of such a method. This holding reflects the interpretation that has already been placed upon the broad language of the opinion of this Court in these *Cement* cases in which this Court did not have before it a Commission order directed against individual action and in which, therefore, the statements of law on this subject were unnecessary to the decision.

We submit that the statements of law on this subject should be clarified or eliminated from the opinion of this Court and that decision on this important point should await a proper case in which the subject is squarely presented in the record or, in the alternative, that reargument be ordered on the price discrimination charge in Count II.

II. This Court erred in not remanding these cases to the Circuit Court of Appeals for consideration of the important contentions of these respondents that the Commission wholly ignored and failed to make any findings on large quantities of material, credible and uncontradicted evidence in this record and that there was no substantial evidence to support a large number of essential findings made by the Commission.

1. We ask only that this Court act on a record which comes to it after careful review of fact questions by the Circuit Court of Appeals and which, therefore, presents a reliable and adequate basis of fact on which decision may be reached.

Under the provisions of the new Administrative Procedure Act[1] these respondents are entitled to have a reviewing court pass upon their contentions that findings of an administrative tribunal are "unsupported by substantial evidence . . . ." and, further, they are entitled to have the reviewing court "review the whole record" in making such determinations.[2]

2. The Circuit Court of Appeals did not reach these questions in its decision because it rested its decision upon an analysis and interpretation of certain of the findings as

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[1] Act of June 11, 1946, Public Law 404, 79th Cong. 2nd Sess., U. S. C. A. Tit. 5, §1009 (e). This Act was approved by the President on June 11, 1946 and Section 10 dealing with Judicial Review became effective September 11, 1946, prior to the date of the decision of the Circuit Court on September 20, 1946.

[2] Id. Sec. 10(e).

made by the Federal Trade Commission and in only one instance reviewed the evidence to determine whether or not the findings as made were supported by substantial evidence.[3] A large number of the findings made by the Commission were not considered by the Circuit Court in its opinion and our important contentions with respect to the failures of the Commission to make findings and the lack of evidentiary support for the findings made were not considered by that Court.[4] Thus, this immense record came before this Court without any review in the Court below of the important contentions made in that Court on this subject.

3. We take sharp issue with the statement in the opinion of this Court[5] that the situation in these cases is the same as in *Sugar Institute* v. *United States*, 297 U. S. 553, in which, as this Court stated, "the trial court subjected the evidence to a thorough and accurate analysis which has left but slight room for debate over matters of fact." 297 U. S. 553, 601.[6] As noted above, the Circuit Court of Appeals

[3] See 157 F. (2d) 533 at 567 in which it is held that Finding 20(h) is not only unsupported by substantial evidence but "contradicts the only evidence on the subject."

[4] See 157 F. (2d) 533 at 542-543.

[5] Pamphlet opinion, p. 27.

[6] *The Sugar Institute* case was tried before Judge Mack in the United States District Court for the Southern District of New York who, after briefs were filed and arguments heard for six days, filed an opinion of 178 record pages and thereafter, after the submission of proposed findings of fact and conclusions of law and two days of further argument, made 218 special findings of fact that occupy 51 record pages. See *The Sugar Institute, et al.* v. *United States*, Oct. Term, 1935, No. 268, R. 85-263, 263-318.

did not review "the whole record" to determine whether or not the findings of the Commission had adequate support in the evidence in this record. Important and critical issues of fact remain unresolved in these *Cement* cases.

4. We submit that it is not an appropriate function of this Court under the new Administrative Procedure Act to review "the whole record" until such time as a lower court has performed its important function of passing upon any challenges as to facts that still remain after the administrative tribunal has made its findings. Until this important function has been performed, there is not presented to this Court a record that is reliable and adequate in so far as the facts are concerned. This is particularly important in these *Cement* cases in which the fact issues are important and raise important economic issues that grow out of the facts in this industry. We note that on May 17, 1948 this Court vacated the judgment of the District Court in *Harris Kennedy et al.* v. *Silas Mason Company*, No. 590 on grounds that are equally applicable here to direct a remand to the Circuit Court of Appeals. We submit that it is not an appropriate task "for a court of nine" to make the initial determinations as to the important issues of fact presented by these respondents. Good judicial administration requires that the important tasks imposed upon reviewing courts under the new Administrative Procedure Act should first be performed by the reviewing court first charged with their performance under that Act, that is, the Circuit Court of Appeals.

5. We believe that the pitfalls that will be encountered by this Court if it undertakes initially to review "the whole

record" under the terms of the new Administrative Procedure Act are vividly illustrated in the opinion of this Court in these cases. We cite the following merely as instances:

(a) The opinion of this Court undertakes to describe the alleged pricing system in this industry by starting with a detailed description of a pricing method in use many years ago in the steel industry known as "Pittsburgh Plus."[7] Whatever that method may have been in that industry, it was not before this Court on this record and was not shown by any facts in this record. Further, the opinion of the Court then states that the "system" in the cement industry is one of multiple bases rather than a single base and that the two systems function "in the same general manner and produce the same consequences"[8] as the "Pittsburgh Plus" method just described. One paragraph from the Commission's Findings is reproduced in footnote 10 on page 14 of the pamphlet opinion. Our challenge to the sufficiency of the evidence to support this important finding is not reviewed.[9] Further, in footnote 9 on page 13, the statement is made that when a base mill absorbs freight in making a sale in the freight-advantage territory of another base mill, the first base mill "becomes as to such sales a non-base mill." The Commission made no such finding. Its other findings plainly show that it has never taken that position.[10]

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[7] Pamphlet opinion, pp. 12-13.

[8] Pamphlet opinion, p. 14.

[9] See our Statement of Points, R. 16241 and our Brief, pp. 83-112.

[10] See Findings, Par. Seven (b), (c), R. 15988-89.

A careful review of our insistence that the Commission has ignored material and uncontradicted evidence and has failed to make important findings on that evidence together with a review of our challenge to the evidentiary support of the findings as made would enable this Court to render its decision on the facts shown in this record relating to the cement industry.

(b) In the opinion of this Court it is stated that "Officers of the Institute took the lead in securing pledges by producers not to permit sales f.o.b. mill to purchasers who furnish their own trucks . . ."[11] We submit that there is no evidence whatsoever in this record to support such a statement and that a careful review of our challenge to the findings of the Commission on the subject of trucking (there was no finding to support the quoted statement of this Court) and its important failures to find on this subject, would reveal the facts as to what took place in this industry with respect to sales to trucks and the absence of any activity whatsoever on the part of the Institute in any such activities.

(c) In the opinion of this Court it is stated that "During the depression in the 1930's, slow business prompted some producers to deviate from the prices fixed by the delivered price system. Meetings were held by other producers; an effective plan was devised to punish the recalcitrants and bring them into line."[12] We submit that there is no evidence whatsoever in this record to support the statement of the Court regarding meetings at which an effective plan was devised to punish recalcitrants. Again, we submit

[11] Pamphlet opinion, p. 28.

[12] Pamphlet opinion, pp. 28-29.

that a careful review of the facts in this record and the failures of the Commission to find as to the facts will reveal what took place in this industry on the subject under discussion.

(d) In the opinion of this Court it is stated that "... the Institute and its members had, in the interest of eliminating competition, suppressed information as to the variations in quality that sometimes exist in different cements."[13] It is difficult to understand how "the Institute and its members" could "suppress" information which this record shows without contradiction to be common knowledge among all buyers of cement. The Commission made a finding that "In general, dealers and ordinary purchasers are not aware of differences in quality among the brands of cement sold by different producers,"[14] but the Circuit Court of Appeals set this finding aside as being contrary to the only evidence on this subject.[15] It is also difficult to understand why any cement producers should waste money advertising quality differences when, in spite of the knowledge of quality difference possessed by all buyers, it is shown without contradiction that no buyer will pay a penny more for one brand of cement than for another. This simple fact was both alleged by the Commission in its complaint[16] and found in its findings.[17]

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[13] Pamphlet opinion, p. 29.

[14] Finding, Par. Twenty (h), R. 16108.

[15] 157 F. (2d) 533 at 567.

[16] Complaint, Par. 8, R. 241.

[17] Findings, Par. Nine (a), R. 16023.

We ask only that these important cases be decided by this Court on a record in which the important controversies as to facts have been adequately resolved by a lower court. Following the extensive hearings before a Trial Examiner, the Trial Examiner's Report Upon The Evidence was wholly inadequate to advise the Commission as to the evidence in this record.[18] The lengthy findings of the Commission were challenged by the respondents on a broad front before the Circuit Court of Appeals and the chief ground of attack was that in making its findings the Commission had failed to find as to uncontradicted evidence that had an important bearing on the issues before the Commission. The Circuit Court, however, did not find it necessary to pass upon these important issues of fact and rested its decision upon other grounds. We submit that this Court should not be called upon to make the initial determinations as to questions of fact and that these cases should be remanded to the Circuit Court to resolve the many disputes as to facts that still exist in order that the principles of law stated by this Court in its opinion in these *Cement* cases may be applied by the lower court to the facts of this industry. We submit that the important economic issues which will have important effects in this and other industries should be resolved only after the Cir-

[18] It consists of only 114 pages of the printed record and almost one-third of it is devoted to formal statements about the complaint, answers and the parties, R. 15659-15772.

cuit Court has set at rest the important issues of fact presented by these respondents and as yet unresolved.

Respectfully submitted,

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Certificate of Counsel

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM J. DONOVAN, being duly sworn, deposes and says:

1. That he is counsel for the respondents in the above entitled cases Nos. 23, 24 and 34, and is acting on behalf of counsel in cases Nos. 26 and 27:

2. That the foregoing Petition for Rehearing is presented in good faith and not for delay.

William J. Donovan

Subscribed and sworn to before me this
22 day of May, 1948.

STEPHEN SHOSTAK
Notary Public in the State of New York
Residing in Queens County
Qu'ns Co. Clk's No. 2500. Reg. No. 276-S-9
Certificates filed in
N.Y. Co. Clk's No. 2071. Reg. No. 1918-S-9
Kings Co. Clk's No. 19[illegible]. Reg. No. 1249-S-8
Commission Expires March 30, 1949